IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
Assigned on Briefs January 13, 2009

IN RE JEREMIAH T., JASMINE T., AND JASPER T.

Appeal from the Juvenile Court for Sevier County
No. 04-M9-158 Jeffrey D. Rader, Judge

No. E2008-02099-COA-R3-PT - FILED APRIL 30, 2009

The trial court terminated the parental rights of Bobby T. ("Father") with respect to his three minor children Jeremiah T. (DOB: August, 2003),[1] Jasmine T.[2] (DOB: July 28, 2004), and Jasper T. (DOB: March 31, 2006).[3] Father appeals, arguing, *inter alia*, that the evidence preponderates against the trial court's findings, stated to be by clear and convincing evidence, that grounds for termination exist and that termination is in the children's best interest. We vacate so much of the trial court's judgment as is based upon willful failure to support and willful failure to visit, in the four months immediately preceding the filing of the petition to terminate. In all other respects, the judgment is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Juvenile Court Vacated in Part and Affirmed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Heather N. McCoy, Sevierville, Tennessee, for the appellant, Bobby T.

Robert E. Cooper, Jr., Attorney General and Reporter; Michael E. Moore, Solicitor General; and Joshua Davis Baker, Assistant Attorney General, General Civil Division; Nashville, Tennessee, for the appellee, State of Tennessee, Department of Children's Services.

No appearance by or on behalf of Jeffrey L. Stein, guardian *ad litem*.

---

[1] DCS's brief states the birth date as August 19, 2003, and Father's brief states the birth date as August 17, 2003.

[2] DCS's brief spells the name "Jaisman" and Father's brief spells the name "Jasmine." We adopt the spelling in Father's brief.

[3] The three children are referred to in this opinion by their first names and collectively as "the children."

OPINION

I.

On February 22, 2007, the State of Tennessee, Department of Children's Services ("DCS") and Attorney Jeffrey L. Stern, guardian *ad litem*, filed a joint petition to terminate the parental rights of Father. The birth mother was not a party to the proceeding because her parental rights had been terminated following a trial on July 23, 2007. On December 10, 2007, this matter was heard at a bench trial. On September 10, 2008, the trial court entered a final judgment, terminating Father's parental rights. The trial court made the following finding of facts:

> [Jasmine] and [Jeremiah] were taken into custody on November 20, 2004, and [Jasper] was subsequently taken into custody on March 31, 2006. All three minor children have remained in the custody of [DCS], continuously since those respective dates.
>
> This Court entered an Order in May 2007 finding there was clear and convincing evidence of dependency and neglect. Since that time, the conditions which were present at that time have continued to exist.
>
> The Court finds [Father] has pled guilty to criminal child neglect as has been borne out by the record and exhibit filed. The charge arose out of the circumstances under which [Jasmine] and [Jeremiah] came into custody. [Father] is currently incarcerated, serving a sentence pursuant to that conviction.
>
> The Court finds that the evidence today as testified to by numerous witnesses shows that there is a lengthy history with [DCS], and notes that the Court is familiar with [Father], having seen him basically grow up for the last eight or nine years, and having had dealings with him throughout that time. The Court candidly notes that it has always been pretty fond of [Father], and has found that he's always been truthful. But he also has continued for the last many years to act as a knucklehead, and that [Father] knows how we got to this point today. In fact, [Father] admitted under oath today that he cannot honestly say he has made any lasting changes to be able to raise his children.
>
> The Court notes that there have been at least three Permanency Plans developed and filed on behalf of these three minor children, and that all were properly staffed and ratified by this Court, and all were reasonable. [Father] signed at least two of them. [Father] was incarcerated at the time one of the Permanency Plans was developed. The Court refers to the particular recitation into the record by counsel as to the number of days that [Father] has been incarcerated over the past few years to provide some background as to this Court's

findings.[4] The Court further finds that, although there have been several caseworkers involved, [DCS] has provided substantial services in the last three years in an attempt to rectify this situation.

The court is certainly mindful of the fact that all three of these minor children have substantial needs which must be met, both physical and psychological. Prior to the earlier termination of the birth mother's parental rights, the Court had hoped that there would be some hope that these two parents would step up and become responsible adults and act as parents on behalf of these children.

There have been numerous instances where visitation was scheduled, and the visitation schedules were not met by either one of the parents, including [Father]. [Father] has at all times been sporadic in his attempts to visit, to remain clean from drugs, and to stay out of trouble.

The Court finds that this particular [Father] has paid the grand sum of $250.00, plus or minus, in support of these three minor children in the last three years. While the Court does acknowledge that [Father] has spent some time in custody, there were numerous times when he was out of custody. The provision for support, both financial and otherwise, has been limited.

[Father] has failed to properly care for these three children's needs. He has not shown the ability to provide a stable home, stable employment, stable transportation, that he could, in fact, act as a parent. The record is replete with this evidence, and the Court refers to the record today and to the testimony of witnesses in support of that finding.

The Court further shows that it entered an Order in May of 2007 finding there was clear and convincing evidence of dependency and neglect. The allegations as set forth in the Petition for Temporary Custody were subsequently proven by the State by clear and convincing evidence and specifically adopted by the Court as findings of fact. The conditions that led to the removal continue to exist.

---

[4] Prior to the removal of Jeremiah and Jasmine, Father was arrested for, and later pleaded guilty to, felony child neglect. He was incarcerated from November 20, 2004, to April 27, 2005. He was released on probation. Father was re-incarcerated from February 9 through February18, 2006. On March 23,2006, Father failed a drug test and was charged with marijuana possession. Juvenile Court revoked his visitation privileges and his probation was revoked on April 10, 2006. He was in jail from April 10, 2006, until November 14, 2006. Father was arrested again on March 24, 2007, and was in jail until July 19, 2007. At the time of trial in December 2007, Father was incarcerated and did not expect to be released until 2009.

> Initially, Jasmine was taken to Ft. Sanders Emergency Department due to her spitting up blood; x-rays were taken and she was released to her parents. When the x-rays were read the next morning, doctors identified an acute fracture of her left femur. Upon further review of the hospital records, personnel discovered that [Jasmine's] then eighteen (18) month old brother Jeremiah had been seen in the Emergency Department the prior month for head trauma. The Sevier County Sheriff's Department subsequently investigated and took out warrants for Felony Child Neglect against the parents. When the Sheriff's Department and [DCS] arrived at the parent's home at 11:00 a.m. the next morning, the parents were still sleeping off the effects of the marijuana they admitted to smoking Friday night after taking [Jasmine] to the hospital. The Petition for Temporary Custody of Jasper . . . alleged that upon his birth, he was at substantial risk of physical injury from his parents, allegations that were subsequently proven by [DCS] by clear and convincing evidence and specifically adopted by the Court as findings of fact.

(Internal alphabetical enumeration omitted.) Having found by clear and convincing evidence that grounds for termination exist, the Court went on to make comprehensive findings related to the best interest of the children, which findings will be discussed later in this opinion.

II.

The issues as stated by Father are:

> Whether clear and convincing evidence supports the trial court's decision to terminate Father's parental rights for failure to substantially comply with the permanency plan dated December 9, 2004.
>
> Whether any permanency plan except the December 9, 2004 was properly admitted into evidence.
>
> Whether clear and convincing evidence supports the trial court's decision to terminate [Father's] parental rights on the statutory grounds of abandonment by failure to pay child support, failure to visit with [the children], and/or wanton disregard for [the children].
>
> Whether [DCS] provided reasonable efforts to reunify [children] with [Father] or a relative.
>
> Whether clear and convincing evidence supports the trial court's determination that termination of parental rights was in [the children's] best interests.

DCS states one additional issue:

> Whether the trial court correctly determined that [Father] consented to the consideration and adjudication of grounds for termination not alleged in the petition for termination of his parental rights.

In its brief, DCS concedes, in effect, that the evidence does not support the trial court's decision to terminate based upon a willful failure to support or a willful failure to visit within the four months immediately preceding the filing of the petition to terminate "[b]ecause, [Father] was incarcerated for part of that four-month period, and because there is no other consecutive four-month period where [Father] was out of jail." In view of this concession, we vacate so much of the trial court's judgment as is based upon these two grounds.

III.

The Supreme Court has clearly set forth the standard of review for cases involving the termination of parental rights:

> [T]his Court's duty . . . is to determine whether the trial court's findings, made under a clear and convincing standard, are supported by a preponderance of the evidence.

In re F.R.R., III, 193 S.W.3d 528, 530 (Tenn. 2006). The trial court's findings of fact are reviewed *de novo* upon the record "accompanied by a presumption of correctness unless the preponderance of the evidence is otherwise." ***Id.*** (citing Tenn. R. App. P. 13(d)). In weighing the preponderance of the evidence, great weight is accorded the trial court's determinations of witness credibility, which shall not be reversed absent clear and convincing evidence to the contrary. *See* ***Jones v. Garrett***, 92 S.W.3d 835, 838 (Tenn. 2002) (citing ***Wells v. Tennessee Bd. of Regents***, 9 S.W.3d 779, 783 (Tenn. 1999)). Questions of law are reviewed *de novo* with no presumption of correctness. ***Id***.

Parents have a fundamental right to the care, custody, and control of their children. ***Stanley v. Illinois***, 405 U.S. 645, 651, 92 S.Ct. 1208, 1212, 31 L.Ed.2d 551, 558 (1972); ***In re Drinnon***, 776 S.W.2d 96, 97 (Tenn. Ct. App. 1988) (citation omitted). This right "is among the oldest of the judicially recognized liberty interests protected by the Due Process Clauses of the federal and state constitutions." ***In re M.J.B.***, 140 S.W.3d 643, 652-53 (Tenn. Ct. App. 2004) (citations omitted). "Termination of a person's rights as a parent is a grave and final decision, irrevocably altering the lives of the parent and child involved and 'severing forever all legal rights and obligations' of the parent." ***Means v. Ashby***, 130 S.W.3d 48, 54 (Tenn. Ct. App. 2003); *see* Tenn. Code Ann. § 36-1-113 (l)(1) (Supp. 2008). "'Few consequences of judicial action are so grave as the severance of natural family ties.'" ***M.L.B. v. S.L.J.***, 519 U.S. 102, 119, 117 S.Ct. 555, 565, 136 L.Ed 473, 489 (1996) (quoting ***Santosky v. Kramer***, 455 U.S. 745, 787, 117 S.Ct. 1388, 1412, 71 L.Ed. 599, 628 (1982) (Rehnquist, J., dissenting)).

While parental rights are superior to the claims of other persons and the government, they are not absolute, and they may be terminated upon appropriate statutory grounds. *See* ***In re Audrey***

S., 183 S.W.3d 838, 860 (Tenn. Ct. App. 2005). Due process requires clear and convincing evidence of the existence of the grounds for termination of the parent-child relationship. ***In re Gabriel L.***, No. E2008-01294, 2009 WL 792825, at *4 (Tenn. Ct, App. E.S., filed March 26, 2009) (citing ***In re Drinnon***, 776 S.W.2d at 97; Tenn. Code Ann. § 31-1-113 (Supp. 2007)).

The statute that governs termination of parental rights in this state is Tenn. Code Ann. § 36-1-113 (Supp. 2008). A parent's rights may be terminated only upon "(1) [a] finding by the court by clear and convincing evidence that the grounds for termination of parental or guardianship rights have been established; and (2) [t]hat termination of the parent's or guardian's rights is in the best interests of the child." Tenn. Code Ann. § 36-1-113(c)(1) and (2) (Supp. 2008); ***In re F.R.R., III***, 193 S.W.3d at 530 (citations omitted). Both of these elements must be established by clear and convincing evidence. *See* Tenn. Code Ann. § 36-1-113(c)(1) and (2) (Supp. 2008); ***In re Valentine***, 79 S.W.3d 539, 546 (Tenn. 2002) (citation omitted). The existence of at least one statutory basis for termination of parental rights will support the trial court's decision to terminate those rights. ***State Dep't of Children's Servs. v. A.M.H.***, 198 S.W.3d 757, 761 (Tenn. Ct. App. 2006).

The heightened burden of proof in parental termination cases minimizes the risk of erroneous decisions. ***In re M.W.A., Jr.***, 980 S.W.2d 620, 622 (Tenn. Ct. App. 1998). Evidence satisfying the clear and convincing evidence standard establishes that the truth of the facts asserted is highly probable, ***State v. Demarr***, No. M2002-02603-COA-R3-JV, 2003 WL 21946726, at *9 (Tenn. Ct. App. M.S., filed August 13, 2003) (citations omitted), and eliminates any serious or substantial doubt about the correctness of the conclusions drawn from the evidence. ***In re M.W.A., Jr.,*** 980 S.W.2d at 622 (citations omitted); ***In re Valentine***, 79 S.W.3d at 546 (citing ***Hodges v. S.C. Toof & Co.***, 833 S.W.2d 896, 901 n.3 (Tenn. 1992)); ***In re S.M.***, 149 S.W.3d 632, 639 (Tenn. Ct. App. 2004); ***In re J.J.C.***, 148 S.W.3d 919, 925 (Tenn. Ct. App. 2004). It produces in a fact-finder's mind a firm belief or conviction regarding the truth of the facts sought to be established. ***In re A.D.A.***, 84 S.W.3d 592, 596 (Tenn. Ct. App. 2002) (citations omitted); ***Ray v. Ray***, 83 S.W.3d 726, 733 (Tenn. Ct. App. 2001) (citations omitted).

IV.

A.

We first consider whether clear and convincing evidence supports the trial court's decision to terminate Father's parental rights for failure to substantially comply with the permanency plans dated December 9, 2004. The December plans[5] were introduced at trial as Exhibit 1. The requirements for Father were listed under a section of the plans titled "Actions Needed to Achieve Desired Outcome." Father was (1) to provide adequate transportation and housing, (2) keep stable legal employment, (3) have an A & D assessment[6] and follow recommendations, (4) submit to random drug screenings, (5) resolve all legal issues, (6) complete age appropriate parenting classes, provide a certificate of successful completion of the parenting classes, (7) have a bonding assessment[7] and (8) have an anger management assessment. Father participated in the creation of the plans and signed them. The plans were subsequently ratified by the trial court.

Tennessee law requires the development of a plan of care for each foster child and, in addition, requires that the plan include parental responsibilities that are reasonably related to the plan's goals. Tenn. Code Ann. § 37-2-403(a)(1) and (2) (Supp. 2008). A ground for termination of parental rights exists when a petitioner proves by clear and convincing evidence that "[t]here has been substantial noncompliance by the parent or guardian with the statement of responsibilities in a permanency plan or a plan of care. . . ." Tenn. Code Ann. § 36-1-113(g)(2) (Supp. 2008).

In this case the trial court made the following finding:

> Under the circumstances today, the Court finds that there have . . . not been substantial efforts to comply with the provisions of the Permanency Plans, the cited goals of which the Court believes would be the most basic requirements that a parent would have in providing for their children. [Father] has been unable to provide that. The Court is supported in that position by [*In re Kenneth C.*, No. 2006-00255-COA-R3-PT, 2006 WL 2357876 (Tenn. Ct. App. M.S., filed August 3, 2006)], which stands for the proposition that evidence of noncompliance with the Permanency Plan therefore supports a trial court's finding of substantial noncompliance. Today's evidence would certainly do that.

The items that the trial court listed as evidence of noncompliance are set out in the trial court's findings of fact. These include Father's pleading guilty to criminal child neglect charges and

---

[5] In December 2004 two plans were developed—one for Jeremiah and one for Jasmine. The requirements for Father are the same in both. The two plans were introduced as Exhibit 1. The parties refer to these two plans as the December 9, 2004, "plan", but we use the plural in this opinion.

[6] An A & D assessment is an alcohol and drug assessment.

[7] A bonding assessment is an evaluation whose goal is to determine the nature and quality of a child's attachments to birth and/or foster parents.

being in and out of jail as set out in footnote 4 to this opinion. In addition, the court found noncompliance in numerous incidences when visitations were scheduled, but the visitations schedules were not met. The court further found that Father "has at all times been sporadic in his attempts to visit, to remain clean from drugs, and to stay out of trouble" and that Father's provision for support of the children, "financial and otherwise, has been limited." Father paid only $250.56 in child support in a period of some three years. The court also found that Father "has not shown the ability to provide a stable home, stable employment, stable transportation" or "that he could, in fact, act as a parent." Finally, the trial court noted that when asked at trial whether he could tell the court honestly that he had made a lasting and permanent change that would allow him to raise his children, Father replied, "No, I sure couldn't." Father then went on to say, among other things, that, when he gets out of jail, he hopes to "go forward with it a different way, not the way I've been doing."

Father argues that at one point he had appropriate housing and had worked sporadically. He completed the bonding assessment and may have taken some anger management classes. He argues in this court that DCS should have offered him drug rehabilitation to address drug addiction as an underlying cause of his problems. He also argues that DCS never offered to assist him in getting employment or obtaining a GED.

Father fails to note, however, that he had the opportunity to attend a court-ordered substance abuse program but was expelled after he was caught drunk. His argument about help to obtain a GED also fails. It is no answer to the issue of substantial noncompliance raised in this case for Father to attempt to place responsibility elsewhere for his own failure to act.

The trial court said it well at the conclusion of the trial. Addressing Father, the court said, "[T]his is not about you today. It's about the children." We conclude that the evidence does not preponderate against the court's factual findings or its legal conclusions that the December 9, 2004 plans[8] were reasonable and related to remedying the conditions that necessitated foster care and that clear and convincing evidence supports the trial court's decision to terminate Father's parental rights for failure to substantially comply with the permanency plans dated December 9, 2004.

B.

We next address an evidentiary issue raised on appeal by Father, which he states as "[w]hether any permanency plan except the December 9, 2004 was properly admitted into evidence." All agree, however, that no plans except those of December 9, 2004 were placed in evidence. But DCS employees testified about other plans. We perceive the issue to be whether the trial court erred in relying on the December 2004 plans as well as other plans made subsequent to December 2004. In its findings of facts, the trial court said:

[8]The trial court held that Father was not in substantial compliance with any of the permanency plans; the holding thus clearly included the December 9, 2004, plans.

> The Court notes that there have been at least three Permanency Plans developed and filed on behalf of these three minor children, and that all were properly staffed and ratified by this Court, and all were reasonable. [Father] signed at least two of them. [Father] was incarcerated at the time one of the Permanency Plans was developed.

The trial court concluded that [Father] "failed to comply in a substantial manner with any of the Permanency Plans for the three minor children as ratified by this Court . . . ."

The original permanency plans dated December 9, 2004, were introduced at trial, without objection, as Exhibit 1. The requirements in the December 2004 plans, previously set out in this opinion, were quite detailed. Although subsequent plans were not introduced into evidence, DCS workers testified concerning the requirements of Father under those plans. After comparing the requirements in the December 2004 plans with the testimony concerning the requirements of the subsequent revised plans, we agree with the argument of DCS that the revised plans did not substantially change Father's requirements. For example, as to plans dated September 9, 2005, the case worker testified to Father's responsibilities under the plans as follows:

> Again, to maintain employment that met his family's budgetary needs, to have reliable transportation, to maintain stable housing and demonstrate budgeting by providing all income and expenses to DCS, to follow recommendations of an A & D assessment and maintain clean drug screens, that he would do anger management and demonstrate the skills, and that he would not incur any new charges and follow all court orders, including charges regarding driving without a license and driving with no insurance.

Father's counsel did not object at the time this testimony about the September 2005 plans came into evidence. In addition, in cross examination, Father's attorney asked questions concerning Father's compliance with these plans covering the areas of anger management classes, the dates of incarceration during which Father could not work on compliance, drug screens, visitation, employment and transportation.

And as to a plans dated June 26, 2006, a case worker testified that Father's responsibilities were as follows:

> [Father] will submit to random drug screens as requested by the Court and DCS. He will obtain and maintain stable housing and stable, legal employment and adequate transportation that will accommodate the entire family. He would resolve all legal issues and not incur any more. He will complete a drug and alcohol assessment, follow all recommendation and provide documentation of completion to DCS.

Again Father's counsel did not object when the DCS employee gave the above testimony at trial and, in cross examination, asked questions concerning compliance with the June 2006 plans such as

reasons why the alcohol and drug assessment was not done and the status of visitation. We note in passing that Father's motion for new trial did not include as a basis that the trial court improperly considered the subsequent plans as well as the December 2004 plans.

In these circumstances, we hold that Father waived his right to complain that the trial court relied (to whatever extent) on the permanency plans subsequent to those of December 2004. Tenn. R. App. P. 36(a) (party responsible for error or who failed to take whatever action reasonably available to prevent or nullify the harmful effect of error not entitled to relief); ***Woodson v. Porter Brown Limestone Co.***, ***Inc***., 916 S.W.2d 896, 907 n.10 (Tenn. 1996) (citations omitted) (objection required at time evidence admitted). *See also* ***Weatherford v. Weatherford***, No. W1999-01014-COA-R3-CV, 2000 WL 1891057, at *3 (Tenn. Ct. App. W.S., filed December 29, 2000) (issue of abandonment tried by implied consent where counsel addressed issue in opening statement and testimony was taken on issue without objection).[9]

C.

We next consider whether clear and convincing evidence supports the trial court's holding that Father abandoned his children in that prior to incarceration Father engaged in conduct that exhibits a wanton disregard for the welfare of the children. The statutory provisions state as follows:

> (g) Initiation of termination of parental or guardianship rights may be based upon any of the grounds listed in this subsection (g) . . . .
>
> (1) Abandonment by the parent or guardian, as defined in § 36-1-102, has occurred.

Tenn. Code Ann. § 36-1-113(g)(1) (Supp. 2008). As relevant to the present case, Tenn. Code Ann. § 36-1-102, referred to in subsection (g)(1), above, provides for the termination of parental rights on the grounds of abandonment in pertinent part as follows:

> (1)(A) For purposes of terminating the parental or guardian rights of parents(s) or guardian(s) of a child . . . in order to make that child available for adoption, "abandonment" means that:
>
> * * *

[9] Father relies on ***In re A.J.R.***, E2006-01140-COA-R3-PT, 2006 WL 3421284 (Tenn. Ct. App. E.S., filed November 28, 2006). That case is distinguishable. In the ***A.J.R*** case the original permanency plan was not introduced into evidence (***id***. at *1) and in this case it was. Also, in the ***A.J.R***. case there was an issue whether the parent had notice of what was required of her. ***Id***. at *4. Here Father signed the December 2004 plans and was visited by a DCS case worker in jail and made aware of the requirements of subsequent plans. In the ***A.J.R***. case, the testimony at trial was insufficient to allow the court to determine the requirements of any of the plans. ***Id***. *4, *5. In this case, the testimony was detailed and allowed a determination that the subsequent plans' requirements were substantially similar to the original plans' requirements. Thus, in this case there is no question that Father was aware of what was required of him.

> (iv) A parent or guardian is incarcerated at the time of the institution of an action or proceeding to declare a child to be an abandoned child, or the parent or guardian has been incarcerated during all or part of the four (4) months immediately preceding the institution of such action or proceeding, and either has willfully failed to visit or has willfully failed to support or has willfully failed to make reasonable payments toward the support of the child for four (4) consecutive months immediately preceding such parent's or guardian's incarceration, *or the parent or guardian has engaged in conduct prior to incarceration that exhibits a wanton disregard for the welfare of the child. . . .*

Tenn. Code Ann.§ 36-1-102(1)(A)(iv) (2005) (emphasis added).

In the case of ***In re Audrey S.***, this court said that subsection iv reflects "the commonsense notion that parental incarceration is a strong indicator that there may be problems in the home that threaten the welfare of the child." ***In re Audrey S***., 182 S.W.3d at 866. The case recognizes that a "parent's decision to engage in conduct that carries with it the risk of incarceration is itself indicative that the parent may not be fit to care for the child." ***Id.*** (citation omitted). The pre-incarceration conduct referred to under subsection iv can have occurred any time prior to incarceration and is not limited to acts during the four-month period immediately preceding the incarceration***.*** ***Id.*** at 871.

In the ***Audrey S***. case, this court stated, "[P]robation violations, repeated incarceration, criminal behavior, substance abuse, and the failure to provide adequate support or supervision for a child can, alone or in combination, constitute conduct that exhibits a wanton disregard for the welfare of a child." ***Id***. at 867-68 (citations omitted).

In this case, Father has repeatedly been incarcerated as is set forth at note 4 to this opinion. He pleaded guilty to felony child neglect, violated probation by failing a drug screen, and was expelled from a court-ordered substance abuse program. After he returned from taking Jasmine to the emergency room for treatment, he admitted smoking marijuana. This was the night before Jeremiah and Jasmine were removed from his custody. A week before Jasper was born, he failed a drug test and was charged with marijuana possession. At trial, he acknowledged having a substance abuse problem. In addition to the problems of repeated incarcerations, illegal activities and substance abuse, Father has paid only $250.56 of child support over a period of some three years. He was incarcerated in December 2007 when this matter was tried and he testified that he would not be released until 2009.

Father argues that he did not willfully disregard his children prior to his incarcerations. He says that he visited them regularly during one period of time, has been employed "some of the time and has made some child support payments." The trial court found, however, that Father "has failed to properly care for these three children's needs. He has not shown the ability to provide a stable home, stable employment, stable transportation, that he could, in fact, act as a parent. The record is replete with the evidence . . . ." The trial court stated:

> Further, the Court cites the case of [***In Re: M.D.E.***, No. E2006-00942-COA-R3-PT, 2007 WL 1958643 (Tenn. Ct. App. E.S., filed July 6, 2007)] . . . for the proposition and well-discussed provision of parental termination case law as it relates to wanton disregard for a child's welfare. In that case, the Court noted that probation violations, repeated incarcerations, substantial drug abuse and failure to support alone or in combination constitute wanton disregard for a child's welfare. This is not limited to the parents' conduct during the four months prior to the incarceration, and can stand in support of termination of parental rights. The Court today cites that case with this proposition and believes it is applicable here.

The trial court held that Father "has shown willful and wanton disregard for the welfare of his three children as demonstrated by his behavior and actions since each of the three children were placed in the custody of the State of Tennessee, Department of Children's Services." The evidence does not preponderate against this conclusion made pursuant to Tenn. Code Ann.§36-1-102(1)(A)(iv) (2005).

D.

We next consider whether DCS provided reasonable efforts to reunify the children with Father or a relative. Tenn. Code Ann. § 37-1-166(a)(1) and (2) provide:

> (a) At any proceeding of a juvenile court, prior to ordering a child committed to or retained within the custody of the department of children's services, the court shall first determine whether reasonable efforts have been made to:
>
> (1) Prevent the need for removal of the child from such child's family; or
>
> (2) Make it possible for the child to return home.

Tenn. Code Ann. § 37-1-166 (a)(1) and (2) (2005). The statute provides that the burden is on the department to demonstrate reasonable efforts have been made. ***Id***. at (b).

The statutory definition of "reasonable efforts" is "the exercise of reasonable care and diligence by the department to provide services related to meeting the needs of the child and the family." Tenn. Code Ann. § 37-1-166(g)(1) (2005). This court has said that efforts in a particular case do not have to be "Herculean" but must be "reasonable efforts." ***State v. Hardin***, No. W2004-02880-COA-R3-PT, 2005 WL 1315812, at *14 (Tenn. Ct. App., W.S., filed May 26, 2005) (internal and external citations omitted). In ***State v. Hardin***, we noted that "[w]hether DCS has used reasonable efforts in a particular case is a fact specific inquiry, and we examine such efforts on a case-by-case basis." ***Id***. at * 14.

In his brief, Father stated that the issue is whether reasonable efforts were used to reunite the minor children with him or a relative. The trial court held that DCS had made reasonable efforts to assist Father in complying with the permanency plans despite the difficulty due to Father's frequent incarcerations. Evidence of reasonable efforts to assist Father in complying with the permanency plans included that DCS provided Father with in-home visitation and drug testing services. It also provided three social services workers to assist Father. DCS says all three quit because Father refused to cooperate. DCS did not place Father in a substance-abuse program since he was in one as part of his probation. There were times when Father was released from jail and did not contact DCS. As the trial court recognized, although DCS tried to help as much as possible, the agency was limited in what it could do given Father's frequent incarcerations. Having reviewed the entire record in this case, we do not find that the evidence preponderates against the trial court's holding that DCS made reasonable efforts to reunite the minor children with Father.

In the text of his brief Father does not address whether reasonable efforts were made to reunite the children with him, but argues that "no consideration was ever made for placement of the minor children with their paternal grandmother Brenda Helton." The trial court did not rule on the issue whether reasonable efforts had been made to place the children with a relative. In the interest of judicial efficiency and since we must review the record *de novo,* we now address whether DCS made reasonable efforts to place the children with a relative.

DCS initially placed Jeremiah and Jasmine in the custody of their maternal grandmother. The children were removed to foster homes after she failed to comply with drug screening requirements. It is thus clear that DCS used reasonable efforts to place Jeremiah and Jasmine with a relative.

But Father argues that no consideration was given to placing the children with his mother, Brenda Helton. At trial, Ms. Helton testified that when the children were taken into the State's custody she went to DCS and asked to have custody. According to her testimony DCS did not consider her because a 13 year old daughter living at home "had truancy and [Ms. Helton's] youngest son was in State's custody . . . [b]ecause he wouldn't go to school and stealing and stuff like that." Ms. Helton testified, "They told me there was no way." DCS argues that it gave consideration to Ms. Helton, but found the placement inappropriate. We agree.

Further, in her testimony at trial, Ms. Helton also acknowledged that she raised the issue of obtaining custody of her grandchildren at one of the hearings in this case. The trial court advised her to hire an attorney and file a petition. In addition, she testified that, prior to trial, she contacted DCS's trial attorney about obtaining custody of the three grandchildren and the DCS attorney advised her to retain counsel. Ms. Helton testified that she did not have the money for an attorney. Father's trial testimony suggests that there may have been other reasons that Ms. Helton did not pursue custody. At trial Father was asked the following question, "Did you ever ask your mother to file a petition for custody?" Father responded, "She says she was going to. And then she was wanting to wait and see what happened. And I don't know if she ever did or not."

State v. Hardin, on which Father relies, is inapposite. In that case the grandparents intervened in the case and filed a motion for custody. ***Id***. at *4. Brenda Helton clearly sought

information about petitioning for custody of the minor children, but failed to take any action. In this circumstance, Father should not now be heard to say that "no consideration was made" to place the children with his mother. As noted earlier in this opinion, reunification is a two-way street. ***Id.*** at *14. To the extent Ms. Helton was not considered, it was due to her own failure to act, for whatever reason. Thus, based upon our own review of the record, we hold that DCS made reasonable efforts to reunify the children with a relative.

E.

Having concluded that the evidence does not preponderate against the trial court's holdings that grounds for termination of Father parental rights exist, we next turn to the issue – whether termination of Father's parental rights is in the best interest of the children. To this end, Tenn. Code Ann. § 36-1-113 (Supp. 2008) provides a non-exclusive list of applicable factors as follows:

> (i) In determining whether termination of parental or guardianship rights is in the best interest of the child pursuant to this part, the court shall consider, but is not limited to, the following:
>
> (1) Whether the parent or guardian has made such an adjustment of circumstance, conduct, or conditions as to make it safe and in the child's best interest to be in the home of the parent or guardian;
>
> (2) Whether the parent or guardian has failed to effect a lasting adjustment after reasonable efforts by available social services agencies for such duration of time that lasting adjustment does not reasonably appear possible;
>
> (3) Whether the parent or guardian has maintained regular visitation or other contact with the child;
>
> (4) Whether a meaningful relationship has otherwise been established between the parent or guardian and the child;
>
> (5) The effect a change of caretakers and physical environment is likely to have on the child's emotional, psychological and medical condition;
>
> (6) Whether the parent or guardian, or other person residing with the parent or guardian, has shown brutality, physical, sexual, emotional or psychological abuse, or neglect toward the child, or another child or adult in the family or household;
>
> (7) Whether the physical environment of the parent's or guardian's home is healthy and safe, whether there is criminal activity in the home, or whether there is such use of alcohol or controlled substances

> as may render the parent or guardian consistently unable to care for the child in a safe and stable manner;
>
> (8) Whether the parent's or guardian's mental and/or emotional status would be detrimental to the child or prevent the parent or guardian from effectively providing safe and stable care and supervision for the child; or
>
> (9) Whether the parent or guardian has paid child support consistent with the child support guidelines promulgated by the department pursuant to § 36-5-101.

Tenn. Code Ann. § 36-1-113(i) (Supp. 2008). The determination of best interest should be considered from the perspective of the child, not the parent. ***In re Giorgianna H.***, 205 S.W.3d 508, 523 (Tenn. Ct. App. 2006) (citations omitted).

In the present case, the trial court made findings of fact on the issue whether termination of Father's parental rights was in the best interest of the children, as follows:

> The Court finds today that having found clear and convincing evidence that the grounds for termination exist, the Court must next determine whether or not this is, in fact, a[s] it relates to these three children, in their best interests. Accordingly, the Court makes the following Findings of Fact:
>
> a. The Court finds that all three of these children have situations with foster parents which are very fortunate for lack of a better term. The record sustains a finding that each of these children have [sic] severe emotional, physical, and mental problems which require much care. The Court believes that these children and their best interests are served by their continuing to remain in these foster homes, and hopes there will be some stability provided in the future.
>
> b. The Court believes it is incumbent upon the Court to make the finding of clear and convincing evidence today and the finding that it is in . . . these children's best interests that the rights of [Father] be terminated in order to allow these children to be properly cared for.
>
> c. [Father] will be incarcerated for at least two more years. Certainly, it is not the fault of these children that [Father] failed to step up and take responsibility of being a father to these children.
>
> (d) The Court further finds that Omni Visions has provided foster care to all these children, that these foster care situations seem to this Court to be appropriate, and these children are very fortunate to be in

> the situation that they are in, given the necessary requirements and day-to-day attention that each of these children require. The children are bonded with their respective foster parents, and the foster families are maintaining sibling visitation. All the children are in preadoptive placements.

The trial court then concluded that the termination of Father's parental rights is in the children's best interest.

We observe that Father acknowledged at trial that he has not made a change in circumstances that would make it safe for the children to be returned to his custody. He has not maintained a steady job, has been incarcerated frequently and has continued to use drugs. At the time of trial, he was in jail, not to be released until 2009. Although he visited the children in January 2006, he otherwise failed to exercise regular visitation during periods when he was not incarcerated. Father has also failed to pay child support consistently.

After reviewing the statutory factors which are applicable to this case, we conclude that the evidence does not preponderate against the trial court's determination that there is clear and convincing evidence establishing that it was in the children's best interest for Father's parental rights to be terminated.

F.

Finally, we consider the issue raised by DCS that Father consented to the adjudication of grounds for termination not alleged in the petition to terminate parental rights. The petition sought termination of parental rights on the sole ground of failure to substantially comply with the permanency plan. DCS argues that at trial evidence concerning other grounds—abandonment and persistence of conditions—was introduced without objection and Father's attorney presented substantive defenses to the allegations. DCS then concludes that the trial court did not err by terminating Father's parental rights on these additional grounds. *See* ***Zack Cheek Builders, Inc. v. McLeod***, 597 S.W.2d 888, 891 (Tenn. 1980); ***Weatherford***, 2000 WL 1891057, at *3.

Father did not file a reply brief and thus made no answer to the argument that the grounds of persistent conditions and abandonment were tried by implied consent. In these circumstances, we hold that Father has waived any defense to DCS's position. *See* ***Volunteer Concrete Walls, LLC v. Cmty. Trust & Banking Co.***, E2006-00602-COA-R3-CV, 2006 WL 3497894, at *4 (Tenn. Ct. App. E.S., filed December 4, 2006) (where party makes no legal argument and cites no authority in support of position, issue waived and not considered on appeal.) *Accord* ***Branum v. Akins***, 978 S.W.2d 554, 557 (Tenn. Ct. App. 1998) (citations omitted). *See also* Tenn. R. App. P. 27(a)(7), (b). We thus hold that the trial court did not err in terminating Father's parental rights on the grounds of abandonment and persistent conditions.

V.

The judgment of the trial court is vacated in part and affirmed in part. Costs on appeal are taxed to the appellant, Bobby T., and his surety, if any, for which execution may issue. This case is remanded to the trial court, pursuant to applicable law, for enforcement of the court's judgment terminating Bobby T.'s parental rights and for the collection of costs assessed below.

CHARLES D. SUSANO, JR., JUDGE